



*Building a healthy and sustainable global community for people  
and the plants and animals that accompany us on Earth*

November 27, 2013

**SENT VIA ELECTRONIC MAIL**

Regional Freedom of Information Officer  
U.S. EPA, Region 9  
Hawthorne Street (OPPA-2) San Francisco, CA  
94105, R9foia@epa.gov

National Freedom of Information Officer  
U.S. Environmental Protection Agency 1200  
Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460, hq.foia@epa.gov

**REQUEST FOR MATERIALS UNDER THE FREEDOM OF INFORMATION ACT**

The Wild Equity Institute ("WEI") is a non-profit, public interest, conservation education organization whose mission is to build a healthy and sustainable global community for people and the plants and animals that accompany us on Earth, and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission, and consistent with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, I respectfully request the following information on behalf of WEI:

- **Any records, including internal and external correspondence, with regards to petitions filed under 42 U.S.C. § 7661d(b)(2) requesting that the EPA object to Title V permits issued by state agencies, to which the EPA has not responded. Specifically, I request any backlog in responding to such petitions, evidence of expeditious process in responding to such petitions, and any system for prioritizing and responding to such petitions in a systematic manner.**

WEI submits this request to the EPA FOIA Officer and the FOIA Coordinator for Region 9 with the understanding that the request will be forwarded to any relevant region or other office as necessary for a complete and full response to this request.

**REQUEST FOR FEE WAIVER**

WEI requests that the Environmental Protection Agency (EPA) waive all fees associated with this request. As shown below, WEI meets the test for a fee waiver under FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA fee waiver regulations published at 40 C.F.R. § 2.107(l). See also Judicial Watch v. Rossotti, 02-5154 (D.C. Cir. May 2, 2003). WEI has been granted fee waivers under FOIA from numerous government agencies including the Fish and Wildlife Service, the Bureau of Land Management, the Army Corps of Engineers, and the Environmental Protection Agency. As in these previous cases, a fee waiver is equally justified here.

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FOIA carries a presumption of disclosure, and the fee waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as WEI access to government documents without the payment of fees. As stated by one Senator: “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the 9th Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” (citing Sen. Leahy). The amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” (citing Sen. Leahy). McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9<sup>th</sup> Cir. 1987).

Thus, both Congress and the courts are clear in their interpretation of FOIA: the main legislative purpose of the 1986 amendments is to facilitate access to agency records by “watchdog” organizations, such as conservation education organizations, that use FOIA to monitor and challenge government activities. As the District of Columbia Circuit Court has stated, the waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and non-profit public interest groups. Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984).

**I. The subject of the request concerns “the operations and activities of the government.”**

The subject matter of this request concerns EPA oversight activities in the administration of the Clean Air Act, and specifically how the EPA is dealing with a backlog of Title V responsibilities. EPA oversight of the Clean Air Act is obviously an identifiable activity of the government. The requested documents are clearly related to and highly informative about EPA’s administration and compliance with the provisions of federal law.

**II. The disclosure is “likely to contribute” to an understanding of government operations or activities.**

In determining the informative value of the requested documents, EPA must consider the content of the record, the identity of the requester, and the interrelationship between the two. The documents requested regarding EPA activities are certain to shed light on EPA oversight of state Title V permitting programs and EPA’s own compliance with the Clean Air Act. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. WEI intends to fulfill its well-established function of public oversight of agency action. WEI is not requesting these documents merely for their intrinsic informational value.

WEI is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws. WEI, its members, employees and Board of Directors have all been substantially involved in the management activities of numerous government agencies for years, and have consistently displayed our ability to disseminate information granted to us through FOIA fee waivers.

The requested information contributes significantly to the public understanding of the operations or activities of the government and enhances the public's understanding to a greater degree than currently exists. WEI possesses the expertise to explain the requested information to the public and the ability to disseminate the requested information as well. Moreover, the news media recognizes that WEI is an established expert in the field of compliance with environmental laws.

### **III. The contribution to public understanding from the release of these documents will be significant.**

A contribution to public understanding will be significant if the information disclosed is new, clearly supports public oversight of Agency operations, including the quality of Agency activities and the effect of policy and regulations on public health and safety, or otherwise confirms or clarifies data on past or present operations of the Agency. In determining whether the disclosure of requested information will contribute significantly to public understanding, another guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added).

The requested documents are not currently in the public domain. Their release is not only "likely to contribute," but is in fact certain to contribute to better public understanding of EPA activities in administering the Clean Air Act, its management of EPA-approved state Title V programs, and EPA's compliance with environmental laws and regulations. WEI's track record of active participation in oversight of governmental agency activities and our consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. Public oversight and enhanced understanding of EPA management of our resources is absolutely necessary and an integral part of our democratic system.

WEI will use the information requested to review EPA compliance with federal environmental law. The information requested in this FOIA request will be used to contribute to one or more of the following: public interest litigation, court documents, local and national newsletters, public presentations, and local and national news stories contributed to or written by WEI and its members. Concurrent with any litigation or other action, WEI will publicize the reasons for the litigation or other action and the underlying actions of the EPA and/or other agencies that have prompted WEI's action. This is certain to result in a significant increase in public understanding of government agency activity. WEI, its members, and its Board of Directors have enforced the provisions of the CAA, ESA, APA, and NEPA many times through information gained from FOIA requests like this one, including cases against the EPA for failing to comply with FOIA and the ESA. WEI intends to use the documents requested in this request in a similar manner.

In addition to the above channels of dissemination, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail lists, which is sent to nearly 2,200 people approximately once a week, and our web page, which is accessed several thousand times each

month. Information concerning the effect that the EPA's activities have on management of species will be disseminated through all these means.

#### **IV. Obtaining the information is of no commercial interest to WEI.**

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to WEI's role of educating the general public. WEI, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

I hope that this letter has demonstrated to your satisfaction that WEI qualifies for a full fee waiver, and that you will immediately begin to search and copy the requested material. Should you decide not to waive fees, WEI plans to immediately appeal such a decision.

Should you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

1) In light of Dept. of the Interior et al. v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001), why does this document constitute inter---agency or intra---agency communication?

2) Why is each document predecisional?

A. To what decision is each of the documents leading?

B. Has this decision been finalized?

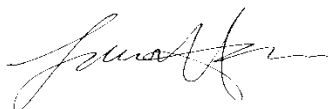
3) Why is each document deliberative?

A. To what extent does each make a recommendation on a legal or policy matter?

4) What policy recommendation qualifies this document for exemption?

I look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. 552(a)(6)(A)(i). Please send all materials to the address above. Please call me at (415) 235-0492 if you have any further questions about this request.

Sincerely,



Laura Horton